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CURRENT TOPICS.

We have not unfrequently been impressed with the idea that no small proportion of the great increase in the necessary labor of the profession, induced by the immense increase in the number and volume of the reported precedents in modern days, might be obviated to a great degree by the general observance of a greater uniformity in the making of indexes and digests, whether of reports or text-books. As matters stand at present, each person who makes an index or digest (and the index of a good book is not unfrequently the work of an inferior hand), takes no other guide in his method of arranging the various topics of the law under their appropriate heads and sub-heads, than his own discretion and sense of propriety. The result is that, as a rule, the arrangement of each separate index or digest represents an independent system with which it is necessary to become somewhat acquainted before it is possible to find the particular matter which is the object of one's search. One individual finds his greatest convenience in minute divisions, and makes as many separate headings as possible. Another, following perhaps the natural bent of his own mind towards logical analysis, divides his subjects into a few cardinal heads, and arranges under each many sub-heads. These are but the extremes; the variations between them are almost as many as the men who do the work. The inconvenience which arises in the use of the ordinary index from these peculiarities, is the fact that one never knows just exactly where to look for any particular matter. A case, or, in a text-book, a paragraph, may be indexed under the various heads of "Bills and Notes," "Contracts," "Indorser," "Negotiable Paper," or "Surety;" and it not unfrequently happens, we venture to say, to every lawyer to find himself compelled to search *seriatim* through the whole list, besides running the risk of missing some one heading, and thereby losing the object of his search. We believe that an immense deal of worry, bother and labor might be avoided, and every index and digest rendered proportionately more valuable, if some standard of arrangement could be adopted, and that public opinion of the profession would soon compel a complete adherence to it in the preparation of such work. Just exactly how this desirable end is to be arriued at, we confess we are somewhat at a loss to say. There is no organized body of the profession of such dignity, that its approval and indorsement of any particular system would carry such weight with the public opinion of the profession as to insure its adoption universally; and the universality of such a system would be its chief element of value. Probably no body of sufficient weight to effect this purpose could be organized short of a conventtion of the reporters, authors and legal editors of the country, which, of course, is impracticable for such a purpose. However, we think the matter of sufficient importance to justify mention, and trust that we shall hear from some of our contemporaries on the subject.

A pròpos of the subject of the appropriate punishment of attempts, the *Solicitors' Journal* has this to say: "The lingering death of the deeply-lamented President of the United States suggests an alteration of our own criminal law. Until the passing of the Criminal Law Consolidation Act, 1861, an attempt to murder was punishable with death equally with murder, although the victim of the attempt might not die within the year and a day, death within which constitutes the crime of murder at common law. In 1861 this was altered, and the attempt to murder is, by sec. 11 of 24 & 25 Vict. c. 100, punishable by penal servitude for life only. The modern resources of medical science prolong life so much that it is not difficult to imagine a case where a murdered man may survive beyond the year and day of grace which the law allows to the murderer. It seems therefore that for once our criminal law may well be altered in the direction of severity."

"CONVERTIBLE PROPERTY."
II.

In the vexed domain of the conversion of fixtures, a mere list of those articles for which trover has, under various circumstances, been held maintainable, would be more confusing than useful. Indeed, it is very hard to be clear and definite in the face of innumerable decisions in utter conflict. Some reconciliation of these contradictory rulings, however, is possible if certain salient points in the law of fixtures be recalled. First, that even at common law the annexation might be constructive, as in the instance of keys and heirlooms, title deeds, deer in a park, fish in a pond, and doves in a dove house. Second, that agreement of the parties, express or implied, may overcome the effect of the most complete attachment to the soil.[1] Indeed, the tendency is to treat as the decisive test the intent with which the annexation was made, as gathered from "the nature of the article affixed, the relation and situation of the party making the annexation, the structure and mode of annexation, and the purpose or use for which the annexation has been made.[2]

The element of intent which figures most in cases of conversion, is the relation between the possessor of the chattel and the holder of the land. The owner of a chattel may affix it to his own land or another's, and the owner of land may annex thereto a chattel which he has obtained by trespass, or bailment for a different purpose, or again, title may be lacking both to the land and the chattel attached to it. Thus the owner of the chattel may affix it to his own land, and then sell or mortgage his property, or die, and others succeed to it. On the other hand he may lease his land, and the tenant may make annexations thereto. There has always been a marked distinction between these two classes of cases, in determining whether an article is to be regarded as a permanent part of the realty, or a removable chattel. Between heir and executor, vendor and vendee, mortgagor and mortgagee, the rigid rule has always prevailed that "whatever is affixed to the realty is thereby made parcel thereof, and belongs to the owner of the soil."[3] But between landlord and tenant a much more liberal rule has been invoked, and the latter allowed to retain as his own property, if reasonably removed, fixtures erected by him for the purposes of trade, ornament or ordinary use, upon leasehold premises during his tenancy.

It is necessary to repeat these elementary doctrines for their bearing on the problems of conversion. Pursuant to these principles, the owner of the soil may in general maintain trover or replevin for fixtures wrongfully detached, and which thereby become his personal property,[4] and hence the landlord can recover for such conversion by his tenant. Thus where the lessee of machinery severed it without permission from the mill to which it was attached, and in that situation it was sold on an execution against the tenant, it was held that no title passed to the purchaser, and that trover lay for the machinery.[5]

On the other hand, a tenant may maintain trover for fixtures wrongfully severed and removed by his landlord, or by a third person.[6] It has been held, however, that a tenant could not maintain trover after his term, for fixtures which he had a right to detach previously;[7] but the rule of reasonable time to remove—at least, where the tenancy is of uncertain duration—which prevails in this country, would seem applicable to cases of conversion. Again, it is ruled in England,[8] and it seems in Massachusetts also,[9] that the tenant can not maintain trover at all where there is no severance, but the conversion consists of other acts, as, for instance, preventing the removal of the fixtures by the tenant. The basis of these decisions is that the fixtures are still a part of the realty, and that

[1] First Parish in Sudbury v. Jones, 8 Cush. 184.
[2] Teaffe v. Hewitt, 1 Ohio St. 530.
[3] First Parish in Sudbury v. Jones, 8 Cush. 184.
[4] Harlan v. Harlan, 15 Pa. 507.
[5] Farrant v. Thompson, 5 Barn. & Ald. 826.
[6] Dalton v. Whittem, 3 Q. B. 961, Boydell v. McMichael, 1 C. M. & R. 177; Hitchman v. Walton, 4 M. & W. 409.
[7] Lyde v. Russel, 1 Barn. & Ad. 394; Minshall v. Lloyd, 2 M. & W. 450; Overton v. Welliston, 31 Pa., and cases cited.
[8] Mackintosh v. Trotter, 3 M. & W. 184.
[9] Guthrie v. Jones, 108 Mass. 193; Raddin v. Arnold, 116 Mass. 270; but see Park v. Baker, 7 Allen, 78, and Talbot v. Whipple, 14 Allen, 177. It is held otherwise where there is an agreement that prevents articles from becoming fixtures by annexation. Curtis v. Riddle, 7 Allen, 185; Gibbs v. Estey, 15 Gray, 587; Poor v. Oakman, 104 Mass. 309; Morris v. French, 106 Mass. 326.

therefore other remedies alone apply. In other States, this objection does not seem to be raised or regarded, but the principles already developed in the case of buildings are regarded as applicable between landlord and tenant. Thus where the landlord conveys improvements erected by a tenant, which the lessee had a right to remove as of a temporary character, and applies the avails to his own use,[10] or where he withholds possession of such annexations from the lessee's purchases, and claims them as his own, although he had given the tenant a written permit for their sale,[11] he is held liable in trover for a conversion of the personal effects of the tenant.

Where the rights of landlord and tenant are not involved, but controversy arises as to the conjunction of title to the land and the chattel, questions touching the conversion arise in such numbers, that it is practicable merely to select a few important and suggestive cases of an illustrative character and of recent date. Among these was the case[12] where the respondent had hauled out and deposited on the line of the railroad a number of fence posts, for the purpose of selling them. They were, without his knowledge or consent, loaded on a construction train and taken away, and used to fence the road, by contractors who had engaged to construct and fence it. It was held, in an action against the railroad company, that the plaintiff could maintain trover against them for the value of the posts, because they were taken without his authority, and, being attached to the company's realty by the contractors while operating the road, came into the possession of the company.[13]

In contrast to this case is that where ties were taken by one who was a sub-contractor for building a railroad, and were used by him in the construction of the road. The sub-contractor put them here and there among the other ties used in forming the superstructure of the railway, spiking rails to them in the usual manner. The road was not delivered up to the company complete and ballasted until five months afterward, though used somewhat earlier. It was held that the owner of the ties, after waiting until they had become realty, could not bring trover against the railroad company as for their conversion. It was said that the only conversion took place before the company had any control over the property. Receiving it as realty, it can not be held that a subsequent neglect or refusal to detach it is a conversion. Having deliberately chosen to wait until the property not only changed custody, but was also still more firmly annexed by ballasting, he can not now treat as personalty in the hands of the railroad company, converted by a mere failure to give it up on demand, what became to his knowledge a part of the realty in the hands of the contractors, against whom he had a remedy for the only conversion that ever took place.[14] The divergence in the decision of cases so similar, is characteristic of this department of the law. In both cases a trespasser annexed the chattels to the soil of one with whom he held contract relations.

The difficulties of this line of cases were further illustrated by the case where the title to the chattel, instead of being utterly lacking, was claimed to be voidable for fraud, and the article, in pursuance of a contract with the husband, was attached to the land of the wife.[15] It was held that the gas-machine thus annexed was in the nature of a fixture; and even assuming that the contract could be rescinded for fraud, the wife, not being a party thereto, would not be liable in trover for refusal to surrender the property. In the view of the majority of the court, the fact that the chattel could be removed without injury to the realty, made no difference; and a refusal to allow the removal of what has become, by the act and intention of the demandant, a part of the freehold, could not be treated as a conversion of personal prop-

[10] Bircher v. Parker, 43 Mo. 443.
[11] Adams v. Goddard, 48 Me. 212.
[12] St. Louis, etc. R. Co. v. Kaulbrumer, 59 Ill. 152.
[13] Fence-rails were also the subjects of controversy in Ricketts v. Dorrel, 55 Ind. 470, where they were attached by a trespasser to his own soil; but it was merely held that replevin would not lie because the chattels could no longer be identified as such, or detached from the realty of which they formed an inseparable part; and in Ogden v. Lucas, 48 Ill. 492, where the action was against a *bona fide* purchaser of lands to which the rails had been attached by his vendor's tenant, who had borrowed them and built them into a fence and corn-bin, and the point of pleading ruled was merely that trespass was not the proper action against such innocent purchaser, though trover might have lain.
[14] Detroit, etc. R. Co. v. Busch (Sup. Ct. Mich.), 11 Cent. L. J. 16.
[15] Morrison v. Berry, 42 Mich. 389.

erty. In a strong dissenting opinion,[16] it was maintained that the wife was in nowise in the position of an innocent purchaser; that she was a stranger who sought to retain the property solely upon the purely technical ground that, by being affixed to her realty, the nature of the property had been changed, and it had become an inseparable part of the realty; and that against this view there stood not only the ready removability of the chattel and the purpose of its annexation, but the fact that there was no such unity of title as would produce the result claimed.

Turning finally to the case where the annexation to another's land is made by the owner of the chattel, like complications are encountered. For illustration, may be taken the case[17] where action was brought to recover damages for wrongfully and maliciously cutting down and unlawfully carrying away a number of telegraph poles, wires and insulators attached thereto, part of a continuous line in operation. It was maintained in the opinion rendered, that the articles in question were affixed to the soil and constituted a part of the freehold.[18] As they could not be cut down without an entry on the realty, and this constituted a material part of the damages, the only action which could properly be brought was trespass *quare clausum fregit*. To the contention that the damage to the real estate was not the cause of action, and that as the tortious acts were committed on the highway, where the defendant had a right to be, there could be no trespass on the close, it was answered that the plaintiffs had affixed their poles to the realty, and that the cutting away of the same was a trespass for which damages could only be recovered by an action *quare clausum fregit*.[19] But it was further insisted that the gravamen of the complaint was for carrying away and converting the poles which were severed, and were personal property after the cutting, even if they were a part of the realty previously. But the court said it was quite obvious that the cutting of the poles and the removal of them were one continuous and uninterrupted transaction, inseparably connected together, which constituted a single cause of action,[20] and can not be divided into two actions—one for the cutting, and another for the conversion.[21] The decision may possibly be justified[22] upon the further ground advanced by the court, to the effect that, conceding that the poles and wires could have been made the subject of a conversion after they had been severed from the soil, it was not established that any such conversion actually took place. The defendant only carried them from the place where they were cut, and from the highway to the ditches and side fences of the road, and left them there, or placed them on the side fences by the roadside. There was no assumption of possession, no attempt to exercise control or to convert to his own use. The mere act of removal, of itself, independently of any claim over them in favor of the defendant, or anyone else, does not amount to the conversion of the poles, wires and insulators.[23]

Another restriction upon the roll of convertible property, was that it formerly did not include *choses in action*. Trover, at common law, "lay only for tangible property, capable of being identified and taken into actual possession. The conversion of the property was the gist of the action; and the action did not lie unless the defendant had become actually possessed of the property by some means, whether of finding or otherwise." Thus this

16 By Judge Cooley.

17 American Union Telegraph Co. v. Middleton, 9 Reporter, 579 (New York).

18 In support of this point, there was cited the case of the Electric Telegraph Co. v. Overseers, 24 L. J. (N. S.) (Part one, Magistrate Cases), 146, where it was held that the proprietors of the wires were liable to pay poor rates as land-holders.

19 It is not at all clear, however, that trespass upon the close should be the only remedy where an article is merely affixed to the realty, while trover would lie for severing and removing timber, trees, or even a portion of the earth itself. See Riley v. Boston W. P. o., 11 Cush. 11, previously cited.

20 This position is well answered in Forsyth v. Wells 41 Pa. St. 291, where it is said: "In very strict form trespass is the proper remedy for a wrongful taking of personal property, and for cutting timber, or quarrying stone, or digging coal on another man's land, and carrying it away; and yet the trespass may be waived and trover brought, without giving up any claim for any outrage or violence in the taking. Where the taking and conversion are one act, or one continued series of acts, trespass is the more obvious and proper remedy. But the law allows the waiver of the taking, so that the party may sue in trover."

21 The court held that the conversion was so coupled with the cutting, that they were the same, thus being enabled to declare that they were both made local, and that the proceedings should have been taken in New Jersey, where the acts charged were committed.

22 The opinion was rendered on a review of an order of arrest, granted against the defendant, and this makes it less directly authoritative.

23 Citing Addison on Torts, 309 (3d ed). But see first part of this article, *ante p.* 264.

case was confined to visible chattels, and did not cover those incorporeal, intangible things, which existed only in idea,—which were considered as mere personal rights, not reducible into possession, but recoverable by law. "But the fiction on which the action of trover was founded, namely, that a defendant had found the property of another, which was lost, has become, in the progress of law, an unmeaning thing, which has been by most courts discarded; so that the action no longer exists as it did at common law, but has been developed into a remedy for the conversion of every species of personal property.[24]

Thus not only does trover lie for coin, like a gold piece of private issue,[25] but it has been held maintainable for paper currency, as bank notes,[26] as well as for negotiable instruments,[27] or securities of any sort, negotiable or not; and indeed for any valuable paper of whatever kind or description. To particularize further, trover lies for evidences of indebtedness, as promissory notes,[28] checks,[29] drafts or bills of exchange;[30] and for evidences of title, whether to things real, as deeds,[31] or to things personal, as chattel mortgages.[32] It lies for certificates,[33] and, it is sometimes held, even for shares[34] of stock. It is maintainable for an agreement or contract,[35] for a bond[36] or a policy of insurance.[37] It lies for records, as a judgment or judgment roll,[38] or an execution issued on a judgment,[39] and even, it has been held, for a parish book of records.[40] Finally, it lies for documents and papers of various kinds, as exhibits at a trial,[41] vouchers and copies of a creditor's account,[42] drawings, manuscripts, letters, and even newspapers.[43] Thus the roll of convertible property has increased in length, until there is hardly a species of incorporeal chattel which it does not cover.

A. J. Donner.

San Francisco.

[24] Payne v. Elliott, 54 Cal. 339.
[25] Chapman v. Cole, 12 Gray, 141.
[26] Moody v. Keeney, 7 Ala. 218; see, also, Coffin v. Anderson, 4 Blackf. 395.
[27] Componet v. Burr, 5 Blackf. 419.
[28] Though paid; Pierce v. Gibson, 9 Vt. 216; Park v. McDaniels, 37 Vt. 594; Spencer v. Dearth, 43 Vt. 98. Generally, see Kingman v. Pierce, 17 Mass. 247; Griswold v. Judd, 1 Root, 221; Stewart v. Martin, 49 Vt. 266; Seago v. Pomeroy, 46 Ga. 227; Todd v. Cruikshanks, 5 Johns. 432; Nettleton v. Riggs, 1 Root, 125; Stephenson v. Feezer, 55 Ind. 416; Donnel v. Thompson, 13 Ala. 440; Nininger v. Banning, 7 Minn. 274.
[29] Tilden v. Brown, 14 Vt. 164.
[30] Tucker v. Jewett, 32 Conn. 563; Ayres v. French, 41 Conn. 151.
[31] Day v. Whitney, 1 Pick. 503.
[32] Stephenson v. Feezer, 55 Ind. 416.
[33] Anderson v. Nicholas, 28 N. Y. 600; Atkins v. Gamble, 42 Cal. 98; Von Schmidt v. Boum, 50 Cal. 616.
[34] Ayres v. French, 41 Conn. 151; Boylan v. Haugh, 8 Nev. 222; Kuhn v. McAllister, 1 Utah, 275; Payne v. Elliot, 54 Cal. 339. *Contra*, Miller v. Kelly, 69 Penn. 407.
[35] Scott v. Jones, 4 Taunt. 865.
[36] Bullock v. Rogers, 16 Vt. 294.
[37] Harding v. Carter, 1 Parkson Ins. 5.
[38] Hudspeth v. Wilson, 2 Dev. N. C. 372. But not or a justice's judgment, according to Cabb v. Comegay, 6 Ired. L. 358.
[39] Keeler v. Fassett, 21 Vt. 539.
[40] Stebbins v. Jennings, 10 Pick. 172; Sudbury v. Stearns, 21 Pick. 148.
[41] Yates v. Pelton, 48 Vt. 314.
[42] Fullam v. Cummings, 16 Vt. 697.
[43] Teall v. Felton, 1 N. Y. (1 Comst.) 537.

LIABILITY OF HUSBANDS SEPARATED FROM THEIR WIVES.

I.

Though they who have been united as man and wife be "put asunder," there are stil bonds unloosened and legal liabilities unescaped; and rightly is it laid down by Leon in Beaumont and Fletcher's comedy:

"You may divorce me from your favour, lady,
But from your state you never shall. I'll hold that,
And hold it to my use—the law allows it."

If the wife, of her own fault, leave her husband, she leaves her authority as his agent behind her, and *a fortiori*, if she commit adultery.[1] His liability would revive, however, under circumstances amounting to a condonation or forgiveness on his part; as, if he were to take her back;[2] or allow her to remain in his house with his children;[3] but the mere subsequent providing her with funds through kindness, without intending to forgive her trespasses, would not, we apprehend, suffice to revive his liability. The onus al-

[1] Atkyns v. Pearse, 2 C. B. N. S. 763; Cooper v. Lloyd, 6 Id. 519; Eastland v. Burchell, 3 Q. B. D. 432; Morris v. Martin, 1 Str. 647; Child v. Hardyman, 2 Id. 875; Ham v. Toney, Selw. N. P. 239; Manby v. Scott, 1 Sid. 109; McCutcheon v. McGahay, 11 Johns. 281; Henderson v. Stringer, 2 Dana, 292; Hunter v. Boucher, 3 Pick. 289; Oinson v. Heritage, 45 Ind. 73; Bevier v. Galloway, 7 Ill. 517. As to proof of adultery, Feedham v. Bremer, 1 L. R. C. P. 583.
[2] Harris v. Morris, 4 Esp. 141.
[3] Norton v. Fagan, 1 B. & P. 226.

ways lies on the plaintiff, claiming against the husband, to prove, not merely the fact of separation, but that it occurred under such circumstances as to give the wife an implied (if not actual) authority to bind him.[4] In Crocker v. Napper,[5] where the wife, having separate property, lived with her daughters away from her husband without his consent, but occasionally seeing him, it was left to the jury to determine whether a rupture had taken place of such a kind as to deprive her of authority to pledge his credit for necessaries. And where the wife is guilty of adultery, and is either expelled by her husband on that account or elopes, or where she commits it after having been compelled by his cruelty to leave him and after he has refused to receive her, he is not liable for necessaries supplied to her during separation, although he do not generally or specifically prohibit tradesmen from trusting her, nor is it necessary to prove that the tradesmen knew of the adultery or elopement;[6] and so, if he has refused to receive her back after she had committed adultery, although he had previously committed adultery himself, and had turned her out of doors without any imputation on her character;[7] but as to where the husband, before the elopement or separation, had been accustomed to pay his wife's bills to the same plaintiff, see Leake on Cont.[8] As to the absence of notice of prohibition in other cases, it is unnecessary here to do more than to cite the recent case of Debenham v. Mellon,[9] already discussed in our last volume. The non-liability of the husband being then assumed, would the wife be liable herself? In Cox v. Kitchin,[10] where a woman was living apart from her husband, in adultery, under an assumed name, Buller, J., seems to have thought she was liable on her own contracts, although she had no separate maintenance. "Here, therefore" he said (*obiter*), "the husband is not liable; and if the wife be not, she stands in a most miserable condition. How is she to find the means of supporting herself? How is she to procure a joint of meat for her daily subsistence? She can obtain no credit unless she be liable for her debt; her situation would be melancholy in the extreme." But, the case was decided on the ground that she had contracted as a *feme sole*, living as and representing herself to be unmarried.[11] On this subject we find two of the American text-writers at variance; Schouler[12] holding that the wife would probably be liable; and Bishop[13] holding the reverse. But we apprehend the negative opinion is the better founded.[14]

In the next place, let us see how stands the law where husband and wife separate by mutual consent. Here, if by the articles of separation she has agreed to accept a certain sum in full for her support, and stipulated not to contract in his name, she can not do so, even if the amount secured to her is inadequate,[15] *sed aliter* if it be not promptly paid.[16] Nor can a tradesman sell to her on her husband's credit, even though ignorant of the separation or the allowance,[17] although there was no written agreement as to the allowance;[18] as to the estoppel by previous conduct, see cases cited *ante*. Subsequent adultery does not *per se* avoid a separation deed, unless the other party's covenants are expressly qualified to that effect;[19] and a covenant by the husband to pay an annuity to trustees for the wife, so long as they shall live apart, remains in force notwithstanding a subsequent dissolution of the marriage on the ground of the

4 Johnston v. Sumner, 3 H. & N. 261; Eames v. Sweetzer, 101 Mass. 80; Gill v. Read, 5 R. I. 346; Porter v. Bobb, 25 Mo. 36.

5 16 L. T. (N. S.) 295.

6 Cooper v. Lloyd, 6 C. B. (N. S.) 519; Hetherington v. Graham, 6 Bing. 135; Hardie v. Grant, 8 C. & P. 512; Morris v. Martin, 1 Str. 647; Hunter v. Boucher, 3 Pick. 289; Sturtevant v. Starin, 19 Wis. 268; McCutcheon v. McGahay, 11 Johns. 231.

7 Govier v. Hancock, 6 T. R. 603.

8 p. 570; also Schoolbred v. Baker, 16 L. T. (N. S.) 359; Ryan v. Sams, 12 Q. B. 460; Filmer v. Lynn, 4 N. & M. 559; Stevens v. Story, 43 Vt. 227; Wallis v. Biddick, 22 W. R. 76.

9 L. R. 6 App. 24; 12 Cent. L. J. 73, 83.

10 1 B. & B. 338.

11 And see De Gaillon L'Aigle, Id. 359.

12 Dom. Rel. 295.

13 1 Marr. & Div.

14 See per Lord Kenyon, in Marshall v. Rutton, 8 T. R. 545; see Lord Brougham's remarks, 3 M. & K. 221; Meyer v. Haworth, 8 Q. B. 467; and cases discussed in 23 Albany L. J. 284.

15 Eastland v. Burchell, 3 Q. B. D. 432; Mallalieu v. Lyon, 1 F. & F. 431; Johnston v. Sumner, 3 H. & N. 261; Biffin v. Bignell, 7 Id. 871.

16 Beale v. Arabin, 36 L. T. N. S. 249; Moore v. Desmond, Arm. Mac. & Og. 101; Baker v. Barney, 8 Johns. 57.

17 Mizen v. Pick, 3 M. & W. 481; Reeve v. Conyngham, 2 C. & K. 444; Pidgin v. Cram, 8 N. H. 350; Cany v. Patton, 2 Ashm. 140; Kimball v. Keyes, 11 Wend. 33.

18 Wilson v. Smith, 1 B. & Ald. 803.

19 Jee v. Thurlow, 2 B. & C. 547; Evans v. Carrington, 2 D. F. & J. 481.

wife's adultery.[20] But the deed is avoided by subsequent reconciliation and cohabitation.[21] In the absence of a covenant not to sue for restitution of conjugal rights, the institution of such a suit does not discharge the other party's obligations under the separation deed.[22] But the husband would still be liable for necessaries supplied to his wife, if the deed granting maintenance be void for want of a trustee on behalf of the wife;[23] and so, if the husband do not show that the trustees gave effect to the deed by taking possession of the property.[24] As regards the question whether the adequacy of the allowance is or is not material, where the wife, separated from her husband by mutual consent, pledges his credit for necessaries, the authorities, both English and American, seem to be somewhat doubtful, and indeed rather at variance.[25]

In the latest case on this subject,[26] the action was brought by a lodging-house keeper against a commercial traveller to recover £28 11s. 6d. for board and lodging supplied, and money lent to the wife of defendant between July and October, 1880. It appeared the defendant had married his wife, who was a barmaid, in 1849, but the marriage did not turn out a happy one. In 1862 the defendant filed a petition in the divorce court against his wife on the ground of adultery, and three months after she filed a cross-petition against him for cruelty. Those suits were, however, compromised, and a deed of separation executed, by which the defendant allowed Mrs. Forster £100 a year. On that allowance she lived till 1872, when the defendant, induced thereto, as he swore, by the solicitations of his children, then growing up, took his wife back. They lived together till 1879, when, on November 14, a quarrel took place about some plate pledged by Mrs. Forster, and her husband turned her out of doors, and she went to reside with the plaintiff. At first the defendant went on allowing his wife something like £4 a week, giving cheques for £20 on account to his brother-in-law, who was his trustee. He wished another deed to be drawn up, but this fell through, as the trustee wanted a guarantee from an eminent firm of brewers, who had employed and pensioned the defendant. After that the defendant, in April, 1880, returned to his old payment of £100 to his wife. After leaving her husband, Mrs. Forster commenced a suit in the divorce court, in December, 1879, for a judicial separation. *Pendente lite* the court ordered the defendant to pay to his wife £150 a year, and after the decree had been pronounced, on March 30, 1881, £180 as alimony. Mrs. Forster, in the witness-box, said she had pawned a silver cream jug and two silver spoons on that day in November, but she had told her husband she should do so, and he said nothing. She wanted a pair of boots, and having raised £3 10s. on the articles in question, spent 12s. 6d. on boots. Her husband had thrown a pail of water on her on the night in question, and she had gone for the police. She had had £20 to £25 in the savings bank then. Her husband's solicitor had paid her bill at the Great Northern Hotel. Mr. Forster deposed that his wife was a most extravagant woman, and in three months made the house a "hell upon earth." Five gentlemen boarders had left because of her conduct; though never actually drunk, she had been constantly under the influence of brandy. She had pledged a quantity of his plate, and had not offered him the tickets, much as he wished to get them. He had educated his daughters, and sent his son to Oxford. When he discovered the last pawning, of which he was not informed, from the maid-servant, he ordered no more meals to be served until it was returned. In spite of this, his wife had ordered a full dinner from the restaurant, having also lunched at home; the former she declined to receive, and it ultimately went to the police station. He had locked the door, and his wife had returned and been most violent, remaining from six till eleven P. M. outside the door ringing the bell and knocking. At last, goaded to desperation, he had flung a pail of water near her on the pavement, but it did not go over her.

[20] Charlesworth v. Holt, L. R. 9 Ex. 38.
[21] Westmeath v. Salisbury, 5 Bli. N. S. 339.
[22] Jee v. Thurlow, 2 B. &. C. 547.
[23] Ewers v. Hutton, 3 Esp. 255.
[24] Burrett v. Booty, 8 Taunt. 343.
[25] See Hodgkinson v. Fletcher, 4 Camp. 70; Hunt v. De Blaquiere, 5 Bing. 550; Nurse v. Craig, 2 B. & P. 148; Holder v. Cope, 2 C. & K. 437; Reeve v. Conyngham, Id. 444; Emmett v. Norton, 8 C. & P. 506; Eastland v. Burchell, *ubi supra*; Johnston v. Sumner, 3 H. & N. 261, 270; Biffin v. Bignell, 7 Id. 877, 879; Cany v. Patton, 2 Ashm. 140; Fredd v. Eves, 4 Harr. 385.
[26] Negus v. Forster, reported in the *Times* of July 4th.

This dispersed the crowd of eighty people who had collected round his door. It was very ill-advised so to have done, and he regretted it. He had only paid the £4 a week on the supposition that the second deed would be executed. He had consented in reality to the decree for judicial separation as being just what he wanted, and had to pay £126 for the costs. His brother-in-law had sued him for £20 odd for money advanced to his wife in the Westminster County Court, and had recovered a fraction of it, with an expression from the judge (Bailey) that the deed of 1862 was still in force. The defendant further stated that his net income was nearly £400 a year; his pension was £750 a year from the brewing firm, and he had 2 1-2 per cent. commission on wine sold from a firm of large importers in the city. He paid, however, £350 a year on insurances on his life. He now lived in a small village out of town. On behalf of the defendant it was considered that there was no case to go to the jury, as the deed of 1862 continued in force; citing Randall v. Gould,[27] Eastland v. Burchell;[28] whereupon Huddleston, B., remarked: "She is absent from her home through his act; there is no suggestion that she had been acting unchastely, and he refuses to allow her to remain beneath his roof. Is it conclusive evidence of the sufficiency of the allowance because she consents to accept a smaller sum? However much he may have felt aggrieved at her pawning the articles, that is no justification for turning her out of doors." For the plaintiff, on the other hand, it was contended that the deed was gone, upon the authority of Vice-Chancellor Stuart's decision in Webster v. Webster; that even if it existed, it had not been acted on by the parties after 1872 till 1879; and that the allowance was not sufficient, as the alimony granted by the Divorce Court was £180 a year, and that would be a thirteenth of the income, which Mrs. Forster placed at £1,350 a year. In delivering the judgment the learned Baron made strong comments on the conduct of Mrs. Forster, whom he could call by no other name than that of "termagant," whose attempts to force a larger allowance out of her husband, after the quarrel of November, 1879, was most improper. He said emphatically wherever there was a conflict between Mr. and Mrs. Forster, he believed the former and disbelieved the latter. If asked, he thought the plaintiff, who had not thought fit to appear, had not supplied the goods on the defendant's credit at all, but had lent herself as an instrument in the hands of Mrs. Forster to annoy and coerce her husband. It seemed that the defendant had turned his wife out of doors without her consent, and that could not be justified. There would then arise an authority of necessity, as spoken of in Johnston v. Sumner. He had no doubt the deed of 1862 existed for all purposes, following Randall v. Gould, and Charlesworth v. Holt. In the former case, Lord Campbell had quoted Webster v. Webster, relied on by the plaintiff, as the authority of his decision. Did the wife become the defendant's agent because the maintenance was not sufficient? It was unnecessary to decide that point, as both parties had so treated the £100, and had acted on it after the separation; and all this negatived any authority to pledge the defendant's credit. The defendant had been ready to do anything to get rid of this pest of his house, but he found his generosity had not been met in the same spirit, and he had not attempted to palliate his conduct in the throwing of the water on his wife. In his (the learned Baron's) opinion, the allowance of £100 was ample, and the plaintiff was not entitled to recover. There would, therefore, be judgment for the defendant, with costs.

Here, it will be observed, Huddleston, B., expressly abstained from offering any opinion as to whether the action would lie, notwithstanding the separation deed, if the maintenance allowed were inadequate. But, we apprehend it would be rather difficult to get over the cases on that point already cited, in the latest of which (Eastland v. Burchell) it was said: "Where the parties separate by mutual consent, they may make their own terms; and so long as they continue the separation, these terms are binding on both. Where the terms are, as in this case, that the wife shall receive a specified income for her maintenance, and shall not apply to the husband for anything more, how can any authority to claim more be implied? It is excluded by the express terms of the arrangement. It is obviously immaterial whether the income is

[27] 27 L. J. Q. B. 57.
[28] 3 Q. B. D. 432.

derived from the wife's separate property, or from the allowance of the husband, or partly from the one source and partly from the other. It is enough that she has a provision which she agrees to accept as sufficient. She can not avail herself of her husband's consent to the separation, which alone justifies her in living apart from him, and repudiate the conditions upon which that consent was given. And it seems superfluous to add that no third person can claim to disturb the arrangement made between the husband and the wife, and to say that he will, by supplying goods to the wife on credit, compel the husband to pay more than the wife could have claimed — that is, the stipulated allowance. He can derive no authority from the wife which she is incompetent to give. We are, therefore, of opinion, that any inquiry into the husband's means was irrelevant." [29] In Pidgin v. Cram [30] it was held that, where husband and wife separate by mutual consent, and the husband contracts with a suitable person to support his wife in a suitable manner, she can not, without any just cause, leave the place and pledge his credit elsewhere for her support. And there are, also, cases holding that, if she has sufficient means of her own, she can not purchase on her husband's credit, but must pay her own bills; for, if she chooses to live apart by mutual consent, and without his fault, she can only render him chargeable in case of actual necessity.[31]—*Irish Law Times.*

[29] So, see Biffin v. Bigaeli, 7 H. & N. 877; but, see Johnston v. Sumner, 3 Id. 261.

[30] 8 N. H. 350.

[31] Dixon v. Harrell, 8 C. & P. 717; Liddlow v. Willmot, 2 Stark. 86; Clifford v. Layton, 3 C. & P. 15, M. & M. 102; Litson v. Brown, 26 Ind. 489.

EMINENT DOMAIN — TITLE OF CONDEMNED PROPERTY — COMPENSATION BY ENHANCEMENT OF VALUE.

KENNEDY v. CITY OF INDIANAPOLIS.

Supreme Court of the United States, October Term, 1880.

1. Under the statutes of Indiana on the subject of eminent domain, and of other States similar thereto, though the right to enter and use the property condemned as soon as it is actually appropriated under authority of law for public use, the owner is not divested of his title without his consent until he has been compensated.

2. Where it is adjudged that the property-owner will receive just compensation for the loss of the property condemned, by the enhanced value of his remaining property consequent upon the improvement, still, unless the improvement is actually constructed, the consideration fails and the title does not pass.

Appeal from the Circuit Court of the United States for the District of Indiana.

T. A. Hendricks, *Conrad Baker* and *B. Harrison*, for appellants; *David Turpie*, for appellees.

Mr. Chief Justice WAITE delivered the opinion of the court:

This is a suit in equity brought by the appellants to quiet title to certain lands in the City of Indianapolis. The facts are as follows: By an act of the General Assembly of Indiana "to provide for a general system of internal improvements," passed January 27, 1836 (Rev. Stat. Ind. 1838, p. 337, sec. 4), the board of internal improvements was authorized and directed to construct, among other public works, the Central Canal, commencing at the most suitable point on the Wabash and Erie Canal between Fort Wayne and Logansport, running thence to Muncietown, thence to Indianapolis, and thence to Evansville on the Ohio River. For this purpose the board was authorized to enter upon, take possession of, and use any lands necessary for the prosecution and completion of the work. Sec. 16. In all cases where persons felt aggrieved or injured by what was done, a claim could be made for damages, which were to be appraised in a way specially provided for; but in making the appraisement the benefits resulting to the claimant from the construction of the work were to be taken into consideration. Any sum of money thus found to be due was to be paid to the board, but no claim could be recovered or paid unless made within two years after the property was taken possession of. Sec. 17. The board was also authorized to acquire, by donation or purchase for the State, the necessary ground for the profitable use of any water-power that might be created by the construction of the canal, and to lease, for hydraulic purposes, any surplus of water there might be over and above what was required for navigation. Secs. 22 and 23.

The Constitution of the State, adopted in 1816, which was in force when this act was passed, and until all the rights of the State under it had been acquired, contained the following as art. I., sec. 7: "That no man's particular services shall be demanded, or property taken or applied to public use, without the consent of his representatives, or without a just compensation being made therefor." The town plat of Indianapolis was laid out on lands granted by Congress to Indiana for a seat of government. On this plat, as originally made, Missouri street extended across the town from north to south, a distance of one mile. The board of internal improvements located the Cen-

tral Canal in this street throughout its entire length. From the southerly end of the street the location extended in that direction across what was then known as outlots 121, 125 and 126. These lots were owned, 126 by one Coe, and the other two by Van Blaricum. During the year 1840, or before, the canal was actually built, filled with water, and to some extent navigated from Broad Ripple, a point on the west fork of the White River, about nine miles north of Indianapolis, to a lock in Missouri Street. From Market Street the canal was actually dug, and its banks built to another lock, a distance of a mile or more below, but it was never filled with water for the purposes of navigation, or, in fact, opened for navigation. The lower lock would, perhaps, hold the water in the level above, but would not pass a boat below.

About the time this part of the work was finished, the whole project of completing the canal was abandoned, and has never since been resumed. Considerable work had been done on the line as a whole before the abandonment, but the only part opened for navigation to any extent whatever, was that between Broad Ripple and the Market Street lock. The premises in controversy are between Market Street and the next lock below.

The State made a lease of water-power to be used at this lower lock, and for many years conducted the water to supply that lease through the canal as constructed below Market street. No other use of the canal was ever made by the State for any other purpose, and both the city and the owners of the several outlots have at all times been permitted to fence, bridge and occupy the property as they pleased, provided they did not interrupt the flow of water to supply the power to a mill that had been built below.

Neither the town of Indianapolis nor Coe ever made any claim on the State for compensation on account of the appropriation of their property. Van Blaricum did, however, do so, and he prosecuted his claim until 1848, when it was finally decided against him. It is conceded that no damages were ever awarded him. The defendants, other than the City of Indianapolis and the railroad company, are the owners of all the title to the outlots occupied by the canal which did not pass to the State under the appropriation that was made. In 1850 the general assembly of Indiana passed an act to sell the canal, and under the authority of that act all the part of the canal north of Morgan County, including the premises in controversy, was conveyed to one Francis N. Conwell for the sum of $2,425. From Conwell the title, such as he got, passed by sundry conveyances to the Water-Works Company of Indianapolis. Afterwards that part of the premises south of Market street, not being essential to the business of the Water-Works Company, was sold to the Indianapolis, etc. R. Company.

Between 1872 and 1874, the City of Indianapolis, the legal successor of the town, took actual possession of Missouri street below the Market street lock, and used it for sewerage purposes, building a sewer therein and filling up the canal. About the same time, McKernan, the ancestor of the present appellees of that name, filled up the canal on the outlots in question, and erected one or more houses thereon. This bill was filed by the mortgagees of the railroad company to quiet the title of the company to this property and protect their security. On the hearing the circuit court dismissed the bill for the reason that the appropriation by the State was not sufficient to divest the owners of their title, and consequently the railroad company took nothing by the conveyances under which it claims.

According to the later decisions of the Supreme Court of Indiana, when lands were taken by the State under the internal improvement laws, and just compensation made to the owners, the title in fee was transferred from the owner to the State. Water-Works Co. v. Burkhart, 41 Ind. 364; Nelson v. Fleming, 56 Ind. 310. The earlier decisions were the other way. Edgerton v. Huff, 26 Ind. 35. But so far as we have been able to discover, it has never yet been held that the title passed out of the owner until "just compensation" had actually been made. In fact, the decisions appear to have been uniformly to the effect that it did not. Thus, as early as 1838, in Rubottom v. McClure, 4 Blackf. 508, it was said in reference to a statute, of which the one now under consideration is almost a literal copy, that it insured "to any individual whose interest may have been made to yield to the public good, remuneration for his loss. Actual payment to him is a condition precedent to the investment of the title to the property in the State, but not to the appropriation of it to public use." This was followed in 1846 by Hankins v. Lawrence, 8 Blackf. 256. That was a case in which the White Water Valley Canal Company had acquired the title of the State to the White Water canal, one of the works the board of internal improvements was authorized to construct under the act of 1836; and the question was whether it could, under its charter, enter upon lands to complete that canal, for the purposes of its incorporation, without first having made just compensation to the owner. Upon this the court said: "The question whether payment must be made before the land is taken and used * * * has been already decided by this court. * * * The possession and use of the land in question by the White Water Valley Canal Company are upon the condition subsequent, that they will not be in default with respect to the payment for the same as prescribed by the charter, nor with respect to the erecting of the works for which the land is taken. It may be that, should any person claiming under the company remain in possession of the land after a default in such payment, or in erecting the works, he would be considered as a trespasser *ab initio*." So far as we have been advised, these cases are still the law of Indiana, and they are certainly supported by high authority. Thus, in Rexford v. Knight, 11 N. Y. (1 Kernan),

314, the Court of Appeals of New York, speaking of statutes similar to that of Indiana, says: "The construction upon those acts has been that the fee did not vest in the State until the payment of the compensation, although the authority to enter upon and appropriate the land was complete prior to the payment." And so, in Nichols v. Som., etc. R. Co., 43 Maine, 359, the Supreme Court of Maine, in speaking of an article of the Constitution of that State, which declared that private property should not be taken for public uses without just compensation, uses this language: "While it prevents the acquisition of any title to land or to an easement in it, and does not permit a permanent appropriation of it, as against the owner, without the actual payment or tender of a just compensation, it does not operate to prohibit the legislature from authorizing a temporary exclusive occupation of the land of an individual as an incipient proceeding to the acquisition of title to it, or to an easement in it for a public use, although such an occupation may be more or less injurious to the owner. Such temporary occupation, however, will become unlawful, unless the party authorized to make it acquire, within a reasonable time from its commencement, a title to the land, or at least an easement in it." And again, in Cushman v. Smith, 34 Maine, 258: "The design seems to have been simply to declare that private property shall not be changed to public property, or transferred from the owners to others for public use, without compensation." Not to multiply cases further, it seems to us that both on principle and authority the rule is, under such a Constitution as that of Indiana, that the right to enter on and use the property is complete as soon as the property is actually appropriated under the authority of law for a public use, but that the title does not pass from the owner without his consent until just compensation has been made to him.

We proceed now to apply this rule to the facts. It is not contended that a compensation in money was made for any of the land in dispute. Van Blaricum claimed money, but the tribunal to which, under the statute, his application was referred, decided against him. In effect he was told in answer to his application, the benefits he would receive from the construction of the canal would be "just compensation" to him for his property taken. The town and the lot-owners adjoining Missouri street made no claim for compensation. Neither did Coe, the owner of lot 126. In this way these parties signified under the law their willingness to take as their compensation the benefits which would result to them respectively from the construction of the canal. The appropriation was for public use by means of a canal, and the owners were to be paid their compensation for the land taken by the construction of a canal thereon. It would seem to follow that if the canal was constructed, the compensation which the Constitution guaranteed the owner would be made; otherwise not. If the canal was in law built, therefore, the title passed to the State; if not, it remained in the owner. The failure to claim damages within the two years was no more than a waiver of all compensation, except such as grew out of the benefits resulting from the construction of the work for which the appropriation was made. To hold that the title passed by mere appropriation, if no claim for damages was made within the two years, would be in effect to decide that if the State entered on land for a particular use, and kept possession as against the owner for two years, it got a title in fee whether the property was actually put to the use or not. Such we can not believe to be the law.

Was there, then, such a canal constructed over and upon the lands in question as the internal improvement act, under which the appropriation was made, contemplated? A canal, in the sense that term implies in this connection, means a navigable public highway for the transportation of persons and property. It must not only be in a condition to hold water that can be used for navigation, but it must have in it, as a part of the structure itself, the water to be navigated ready for use. Such an instrumentality for "the advancement of the wealth, prosperity and character of the State" (Rubottom v. McClure, *supra*, 507) might confer benefits that would be a just compensation for the private property taken for its use; but until such a structure is actually furnished complete, it can in no proper sense be said that the works have been constructed from which the benefits that are to make the compensation can proceed. A mill-race carrying water for hydraulic purposes is not enough. There must be a canal fitted in all respects for navigation and open to public use, before the benefits can accrue to the owner which are under the law to overcome his claim for damages. No authority was given the board of improvements to appropriate lands for the use of the water-power created by the canal. That could only be acquired by donation or purchase (sec. 16), and no power could be leased until there was a surplus of water. The canal was to be built for navigation. If, when built, there was found to be more water than was wanted as a means of transportation, it might be leased; but until there was a canal for navigation, there was in law none for power. The use of the water for hydraulic purposes was but an incident to the principal object of the work to be done.

There can be no pretense that this canal was ever navigated below Market street, or put in a condition for navigation. It was accepted from the contractor, and may have had all its banks and its bed complete; but it is evident from the testimony that it was never finished so that it could be actually used as a navigable canal, and it certainly was never opened by the State to public use in that way. More work had been done on it than on some other parts of the line, but still it was unfinishedwhen the abandonment of the enterprise took place.

We are aware that in the case of the Water-

works Company v. Burkhart, *supra*, the Supreme Court of Indiana decided that the title to the land then in dispute had passed from the owner to the State; but that was on the level above Market street, which had been not only made navigable, but had actually been, to some extent, navigated. The owner, too, had been awarded and paid damages in money. So in Nelson v. Fleming, *supra*, the canal was completed and had been in actual use by the public as such for a period of between thirty and forty years before the abandonment occurred. In both these cases, according to the rule that has been stated, the compensation was actually made and the title passed. There the question was one of reversion after title once acquired. Here, as we think, the State never got title, since the requisite compensation was never made. Consequently, the State had no title to the property to convey, and the railroad company took nothing by its purchase. It follows that the decree below was right, and it is consequently affirmed.

FEDERAL COURT — JURISDICTION — INJUNCTION TO STATE COURT—REMOVAL OF CAUSES.

KERN v. HUIDEKOPER.

Supreme Court of the United States, October Term, 1880.

Where a State court has improperly refused a petition for removal in a replevin suit, and has proceeded to final judgment restoring the property, and upon failure to comply with this judgment suit has been begun upon the replevin bond in the State court, the Federal court having in the meantime taken jurisdiction of the cause, an injunction may be issued by the Federal court to stay proceedings in the suit on the replevin bond.

Appeal from the Circuit Court of the United States for the Northern District of Illinois.

E. Walker, for appellants; *Henry Crawford*, for appellees.

Mr. Justice WOODS delivered the opinion of the court:

After the recovery of the judgment at law, on June 5, 1878, by Charles Kern, one of the appellants, in the circuit court for the county of Cook, in the action of replevin mentioned in the case No. 538 [see full report 13 Cent. L. J. 169], notwithstanding the removal of the said cause to the Circuit Court of the United States for the Northern District of Illinois, the writ of *retorno habendo* was issued thereon, which the plaintiffs in the replevin suit refused to obey. Thereupon, on June 7, 1878, an action of debt upon the replevin bond given by them was begun in the circuit court of Cook county against Frederick W. Huidekoper, Thomas W. Shannon and John Dennison, the principals, and A. B. Meeker and John B. Drake, the sureties on said bond.

The action was brought in the name of Emil Dietzsch, the coroner, for the use of Charles Kern, the sheriff, who was nominally interested only, the real interest in the litigation being in the judgment and execution creditors, the Bank of North America and John McCaffrey. Thereupon Huidekoper, Shannon and Dennison, on June 10, 1878, filed the bill in this case in the United States Circuit Court for the Northern District of Illinois, against Dietzsch and Kern, in which they prayed an injunction to restrain them, their attorneys, agents, etc., and the execution creditors represented by them, from prosecuting any suit upon said replevin bond against the principals or sureties therein, "or in any manner whatever taking any action to enforce any liability or right upon said pretended judgment of return entered in said circuit court of Cook county or upon the said replevin bond." On July 1, 1878, a preliminary injunction was allowed, restraining the defendants below from in any manner prosecuting said action upon the replevin bond, or in any manner enforcing said judgment of return.

After the filing of this bill, the action on the replevin bond in the State court was dismissed as to all the defendants except John B. Drake. On October 20, 1879, the complainants below filed their supplemental bill, in which they allege that, on October 1, 1879, on motion of William J. Hynes, an order was entered in the circuit court of Cook county in the said suit brought in the name of Emil Dietzsch on said replevin bond, against complainants and their sureties, by which the Bank of North America and John McCaffrey were substituted for Dietzch as parties plaintiff in said action, and an amended declaration was filed by them as such plaintiffs, and a rule was entered against Drake requiring him to plead to such amended declaration within twenty days.

The supplemental bill charged that the Bank of North America and John McCaffrey, and Edwin Walker, their attorney, had personal knowledge of the allowance and issue of said injunction, and that the judgment in favor of the Bank of North America was the property of Walker, and that the proceedings in said action of debt were in violation of the injunction of the court and taken for the purpose of evading its orders, and prayed that the Bank of North America, McCaffrey, Walker and Hynes might be made parties defendant to the bill, and that the injunction allowed upon the original bill might be so enlarged as to include the said new defendants. Thereupon the Bank of North America, McCaffrey, Walker and Hynes appeared and filed their demurrer to the original and supplemental bills, alleging as grounds of demurrer that the court had no jurisdiction to enjoin proceedings in the Circuit Court of Cook County, Illinois, as prayed for in said original and supplemental bills.

The demurrer was overruled. The defendants who demurred electing to stand by their demurrer, declined to plead or answer. Thereupon

decree *pro confesso* was taken against them, and a final decree was made against all the defendants, by which the preliminary injunction allowed in the case was made absolute and perpetual.

That decree is brought here by appeal.

We have already decided in Kern v. Huidekoper (No. 538), that the suit in replevin, instituted by Huidekoper and others against Kern in the Circuit Court for Cook County, was removable to the United States Circuit Court; that by the proceedings for that purpose it was effectually removed on July 27, 1877, to the Federal Court, which after that date, alone had jurisdiction thereof, and that all the proceedings in the State court in the cause after that date were without jurisdiction, and absolutely null and void. Upon this state of facts, the only question for decision in this case is, could the court below enjoin the appellants from proceeding in the action at law, brought by them on the replevin bond in the Circuit Court for Cook County?

The action on the replevin bond in that court was simply an attempt to enforce the judgment of that court in the replevin suit, rendered after its removal to the United States Circuit Court, and after the State Court had lost all jurisdiction over the case. If no judgment had been rendered in the State court against the plaintiffs in the replevin suit, no action could have been maintained upon the replevin bond. The bond took the place of the property seized in replevin, and a judgment upon it was equivalent to an actual return of the replevied property. The suit upon the replevin bond was, therefore, but an attempt to enforce a pretended judgment of the State court, rendered in a case over which it had no jurisdiction, but which had been transferred to and decided by the United States Circuit Court, by a judgment in favor of the plaintiffs in replevin.

The bill in this case was, therefore, ancillary to the replevin suit, and was in substance a proceeding in the Federal court to enforce its own judgment by preventing the defeated party from wresting the replevied property from the plaintiffs in replevin, who, by the judgment of the court, were entitled to it, or what was in effect the same thing, preventing them from enforcing a bond for the return of the property to them.

A court of the United States is not prevented from enforcing its own judgments by the statute which forbids it to grant a writ of injunction to stay proceedings in a State court. Dietzsch, the original plaintiff in the action on the replevin bond, represented the real parties in interest, and he was a party to the action of replevin, which had been pending, and was finally determined in the United States Circuit Court. That court had jurisdiction of his person, and could enforce its judgment in the replevin suit against him, or those whom he represented, their agents and attorneys. The bill in this case was filed for that purpose and that only.

If the bill is not maintainable, the appellees would find themselves in precisely the same plight as if the judgment of the United States Circuit Court in the replevin suit had been against them, instead of for them. The judgment in their favor would settle nothing. Instead of terminating the strife between them and their adversaries, it would leave them under the necessity of engaging in a new conflict elsewhere. This would be contrary to the plainest principles of reason and justice.

As the bill in this case is filed for the purpose of giving to litigants on the law side of the court the substantial fruits of a judgment rendered in their favor, it is merely auxiliary to the suit at law, and the court has the right to enforce the judgment against the party defendant and those whom he represents, no matter how or when they may attempt to evade it or escape its effect, unless by a direct proceeding. These views are sustained by the case of French v. Hay, 20 Wall. 250, between which and this case there is no substantial difference.

We think, therefore, that the demurrer to the bill was properly overruled, and that the decree of the circuit court should be affirmed.

MARRIED WOMAN'S CONTRACT—CHARGING HER SEPARATE ESTATE.

DAVIS v. SMITH.

Supreme Court of Missouri, April Term, 1881.

1. A married woman, though possessing a separate estate, can make no contract binding herself personally, or on which she or her personal representatives can be sued at law. King v. Miltenberger, 50 Mo. 183, overruled.

2. A note, made by a married woman while she was a *feme covert* and possessed of a separate estate, is not a debt against her for which her personal representative can be sued, nor is it such a debt as can be allowed in the probate court against the general assets of the estate in course of administration.

3. When a married woman, having a separate estate, dies, it ceases to be such, and stands like any other property she may have owned; and one to whom she has incurred an obligation, while married, has no right to satisfaction of his debt out of any of her property other than the separate estate; but it is subject to the debts of her general creditors, and the latter, equally with the special creditor, have a right to resort to what was her separate property.

4. Where a married woman possessed of a separate estate died pending a suit in the circuit court to charge such estate with a note executed by her while married, the suit was properly revived against her heirs. The proper decree of the court where the finding is for the plaintiff is such case stated in the opinion.

5. A note, executed by the ancestor without proof of its execution, can not be read in evidence against the heirs against whom the suit has been revived, where the latter stand upon an answer made by their guardian denying all the allegations of the petition.

Appeal from Greene County.

HENRY, J., delivered the opinion of the court:

This was a suit originally against Harriet and Patrick R. Smith, her husband, and Robert, as trustee of the said Harriet, wherein it was sought to charge the separate estate of Mrs. Smith with the payment of the balance of a note executed by her, her husband, and her said trustee, payable to the plaintiff. Mrs. Smith died while the suit was pending, and, after defendants had answered each, admitting the execution of the note, and the husband and wife alleging her coverture when the note was executed; that she received no consideration for her signature; that it was procured by fraud on the part of the plaintiff; that it was not voluntarily executed by Patrick, and that Harriet signed by compulsion of her husband, to which plaintiff was a party, and that she did not intend to charge her separate estate with payment of the note. Robert's answer admitted his execution of the note as trustee of said Harriet. In February, 1875, plaintiff filed a replication to this answer, denying all its defensive allegations. Subsequently Harriet died, and this suit was revived against her heirs at law, and Geo. Hubbard was appointed their guardian *ad litem*, and as such filed an answer denying all the allegations of the petition, to which no replication was filed. The cause was taken from the Circuit Court of Newton County, where it originated, to Greene County, by change of venue, where, on a trial at the October Term, 1877, defendant had judgment from which plaintiff has appealed. On said trial plaintiff read as evidence those parts of the answer of the original defendants admitting the execution of the note—the note itself, a deed conveying the property in question to Robert as trustee for the separate use, etc., of Harriet Smith, and proved that she had no other estate, and that there had been no administration of her estate—no objection was made to the admission of any of the evidence, and the judgment must have been based upon the conclusion that the circuit court had no jurisdiction of the cause, Mrs. Smith having died while it was pending. In other words, the argument made here must have prevailed in the circuit court, that, after the death of Mrs. Smith, the plaintiff had a legal demand which he could have presented for allowance in the probate court, or that the administrator of her estate, instead of the heirs, was the proper party, even if the circuit court could retain, because it had once acquired, jurisdiction. The question is, therefore, presented, whether the plaintiff had a claim against Mrs. Smith or her property, of which the probate court had jurisdiction. As to the precise nature of the obligation of a *feme covert* who had a separate estate when it was incurred, the authorities are not agreed, but are in inextricable confusion. It is well settled in this State that if she execute a note, and nothing to the contrary is expressed, the creditor may, by a proceeding in equity, have it satisfied out of her separate property. White v. Cameron, 23 Mo. 457. But it is not a lien, or, strictly speaking, a charge upon the property, nor does it bind her personally. All that can be said of it is, that it is an anomalous obligation, neither binding her nor her estate, general or separate, but only constituting a foundation for a proceeding in equity, by which her separate property may be subjected to its payment, and until a decree to that effect is rendered, it is neither a lien nor a charge upon that estate. If she owns, in addition to her separate property, other property in which she has no separate estate, even where a court of equity enforces payment of the obligation out of the separate estate, it will not, for any deficiencies of the separate estate, allow a resort to her other property; but the proposition urged here is, that after her death, that becomes a personal obligation which, when entered into, was no obligation at all. Except with respect to her separate property, the obligation was a nullity both at law and in equity; and at law, even the ownership by her of a separate property, gave it no validity whatever. At law, she is during her coverture generally incapable of entering into any valid contract to bind either her person or her estate. In equity, also, it is now clearly established, that she can not, by contract, bind her person or her property generally. The only remedy allowed will be against her separate property. The reason of this distinction between her separate property and her other property is, that as to the former she is treated as a *feme sole*, having the general power of disposing of it; but as to the latter, all the legal disabilities of a *feme covert* attach upon her. Story's Eq., sec. 1397.

In Sackett v. Ray, 4 Bro. C. C. 485, the Master of the Rolls said: "It is agreed that supposing her a *feme sole*, she could do the act, where the single woman can act, because she can bind herself personally; but is there any contract this married woman could enter into, that would bind her after the termination of the coverture? If she gave a bond, could she be sued upon it after the coverture? Certainly not. A man or a single woman, as they can bind themselves personally, may bind their executors and administrators; but it is not so of a married woman." In Aylett v. Ashton, 1 Myine & Craig, 105, which was a suit to compel the specific performance of an agreement made by a married woman with respect to her separate estate, Lord Cottenham, referring to Francis v. Nozzell, 1 Mod. 258, said: "It was there decided, and clearly in conformity with all previous decisions, that the court has no power against a *feme covert in personam*, but that if she has separate property, the court has control over that separate property. In all cases, however, the court must proceed *in rem*, against the property. A *feme covert* is not competent to enter into contracts so as to give a personal remedy against her. Although she may become entitled to property for her separate use, she is no more capable of contracting than before; a personal contract

would be within the incapacity under which a *feme covert* labors."

If the contract of a married woman could, with respect to her personal property, be treated as a personal obligation even in equity, we see no reason why it could not be specifically enforced to the extent of that property; and that it was refused by Lord Cottenham in Aylett v. Ashton, *supra*, conclusively shows that it was not regarded by him as a personal obligation in any sense whatever. In Parker, Ex'r., v. Lambert's Adm's., 31 Ala. 89, it was held that "a married woman, owning a separate estate by deed, living apart from her husband by agreement with him, could not, at common law, make any contract upon which either she or her personal representatives could be sued at law." The contrary was held by this court in King v. Miltenberger, 50 Mo. 184, but no authority was cited in support of the decision there announced, and the argument is far from satisfactory. This case was followed by the Court of Appeals in Horton v. Ransom, 6 Mo. App. 19, and Slatery v. Howard, 7 Mo. App. 380; but as King v. Miltenberger is in conflict with the general current of authority, both in the United States and in England, and with the principle upon which the separate property of a *feme covert* is charged in equity, we are constrained to recede from the doctrine therein announced, and to bring this court in harmony with the better considered adjudications elsewhere.

It follows from the foregoing premises that when Mrs. Smith died, the note in suit was not a debt against her for which her personal representative could be sued, and it could not be allowed in the probate court against the general assets of her estate in course of administration.

It is no demand against her general estate. It could not be allowed as such. It was not a lien upon her separate estate. The right of the plaintiff to satisfaction out of her separate property is a creation of equity, recognizable nowhere else, and enforceable nowhere else. The probate court could in no manner adjudicate the demand, not because it has not jurisdiction of equitable as well as legal demands against the estate, but by reason of the special provisions regulating the exercise of the jurisdiction conferred upon that court.

All demands are to be classed in first, second, third, fourth, fifth or sixth class, and to be paid in proportion to their amounts, and no demand of any class can be paid until all previous classes are satisfied. One holding the obligation of a *feme covert* would have no right to any other property of her estate, and if his demand were placed in either of the classes; he might, if the provisions of the statute were strictly observed, get satisfaction of his demand out of the general property to the exclusion of oth r creditors who, as to that property, have a preference over him. Specific provisions are made for these cases in which demands are liens upon any of the property of the testator or intestate, and none of these provisions applies to the plaintiff's claim, for, he has no lien. He has no demand against the estate for which he could sue Mrs. Smith's executor or administrator, and has no remedy except that to which he has resorted. Thus far we encounter no difficulty; but here one occurs, which should be me by an amendment of the administration law, inasmuch as in this progressive age it is not unusual for married women to execute promissory notes and incur other pecuniary obligations, and to hold property for their sole and separate use.

When a *feme covert* dies, her separate property ceases to be such, and stands upon the same footing as any other she may have owned. While her death does not extinguish the right of one to satisfaction of an obligation incurred by her while a *feme covert*, out of what was her separate property, he has no right to satisfaction out of any other of her property, which is subject to the debts of her general creditors, if she has any, and she may have such, while they, equally with the special creditors, have a right to resort to whatever was her separate property for payment of their demands. If, then, the court should find for plaintiff, what judgment shall it render? If it decree the sale of this property for payment of plaintiff's demand, and it should thereby be paid, and there should be other creditors, either general or special, he would obtain a preference to which he is not entitled over either class. Nor can the courts determine in this cause whether there are or not other creditors; for unless parties to the proceedings, if there were any, they would not be bound by such adjudication. It has been ascertained in this case that Mrs. Smith was possessed of no other property; but it has not been, nor could it in this proceeding be, conclusively ascertained that she owed no other debts. The circuit court can not bring other creditors in and take charge of the administration of the estate by allowing demands against it, and making final distribution. That jurisdiction has been confided to the probate court. Titterington v. Hooker, 58 Mo. 593. That there is here probably but one creditor, and only this specific property can not change the principle or warrant an assumption by the circuit court of probate jurisdiction. Therefore all that that court can do, if it finds for the plaintiff, is to enter a decree charging this property, with plaintiff's demand—with directions to the probate court of the proper county, where letters of administration on the estate shall have been granted, to have the demand paid out of the property, if no other creditors of the estate appear within the time allowed by the administration law. If other creditors appear and have claims allowed, then this demand of plaintiff shall be placed in the class to which it would be entitled under the administration law, if it were an ordinary demand against the estate. There being no other property, it stands upon the same footing as other unpreferred demands against the estate. This would not be proper if there were other property and general creditors of

the estate. In such case the directions should be such that the preference of the general creditors in the assets, other than what was her separate property, should be preserved, and any preference of the special creditor in the latter should be prevented. If the other general assets should be exhausted, and leave the general creditors unpaid, in whole or in part, they would have an equal right to the payment of their unpaid balance out of such other estate with the special creditor for the amount of his claim. That is *his* demand, and the respective balances due them would be paid in proportion to the amount then due and unpaid to said special and general creditors respectively. With respect to the pleadings, plaintiff, under sec. 5, Wagner's Statutes, p. 1050, must prove all material allegations put in issue by the answer of the guardian *ad litem*. The pleading of Mrs. Smith is to be taken as that of her representative, unless the latter see proper to file amended pleadings. Here the guardian, for his ward, filed an answer denying all the allegations of the petition, and thereby put plaintiff to proof of the same, as if there had been no answer filed by Mrs. Smith. If objection had been made, it would have been error to allow plaintiff to read portions of Mrs. Smith's answer as evidence, or to read the note without proof of its execution. Mrs. Smith's answer, without an affidavit denying the execution of the note, was not sufficient to put plaintiff to proof of its execution; but the heirs are not presumed to know whether their ancestor did or did not execute it, and therefore could not be required to make such an affidavit in order to impose on the plaintiff the burden of proving its execution. Judgment reversed, and cause remanded. SHERWOOD, C. J., and NORTON, J., dissenting.

ABSTRACTS OF RECENT DECISIONS.

SUPREME COURT OF THE UNITED STATES.

October Term, 1880.

CONSTITUTIONAL LAW—MUNICIPAL BONDS—ESTOPPEL.—1. The Constitution of Tennessee (art. 11, sec. 7), declares that "the legislature shall have no power * * * * to pass any law for the benefit of individuals inconsistent with the law of the land, nor to pass any law granting to any individual rights, privileges or immunities other than such as may be by the same law extended to any member of the community who may bring himself within its provisions: Provided, always, the legislature shall have power to grant such charters of incorporation as may be expedient for the public good." There is a statute of the State requiring a popular vote to sanction the subscription of a county or town to railroads: *Held*, that certain State statutes authorizing a limited number of counties to make a subscription to certain railroad stock without a previous popular vote, and authorizing the railroad to receive such subscription, does not violate the above constitutional provision, the proviso contained therein authorizing the grant of such special privilege in charters of incorporation. 2. A county which, by its proper officers, assures the managers of a railroad that certain county bonds issued to another railroad will be paid (the validity of those bonds being in question), on the faith of which the managers effect a consolidation with the other railroad, is estopped from setting up the invalidity of those bonds against holders so acquiring them. Affirmed. In error to the Circuit Court of the United States for the Western District of Tennessee. Opinion by Mr. Justice HARLAN.— *Tipton County v. Rogers Locomotive, etc. Co.; Same v. Norton; Same v. Edmunds.*

LAND GRANT TO STATES FOR RAILROAD PURPOSES—CHANGE OF LOCATION.—The act of Congress of May 15,1856, granted to the State of Iowa, for railroad purposes, certain lands within fifteen miles of the then intended location; which limit was subsequently changed to twenty by the act of July 2, 1864, which also authorized a change of location of the road. The question in this case being whether the railroad company acquired title to any lands within the old fifteen mile limits of the road, but which were left outside of the new twenty-mile limit by a change of location: *Held*, that the title vested by the first act, and was not forfeited by the subsequent change of location. And even if it was, the title remained in the road until proceedings by the parties to whom the forfeitnre accrued divested it, and such forfeiture can not be asserted as a defense by a disseizor, but is a question entirely between the parties to the grant. Affirmed. In error to the Supreme Court of the State of Iowa. Opinion by Mr. Justice MILLER.—*Grinnell v. Chicago, etc. R. Co.*

FRAUDULENT CONVEYANCE.—This was a suit to set aside certain conveyances by the defendant's intestate in trust for his wife and child, as being made with intent to hinder, delay and defraud creditors. It appeared upon the pleadings that at the time of making the conveyances the deceased was free from debt, in comfortable circumstances and engaged in a prosperous business; that of the property in question only one piece was acquired after the dealings, out of which the indebtedness arose, had commenced. The cause being submitted upon the pleadings, the court below decreed a sale of that portion of the property which was acquired after the dealings between the complainant and deceased had commenced, to satisfy the judgment. *Held*, error. There was nothing in the pleadings to justify the conclusion that the conveyance was fraudulent. Appeal from the Supreme Court of the District of Columbia. Opinion by Mr. Justice HARLAN.—*Clark v. Killian.*

MUNICIPAL CORPORATION—SUBSCRIPTION TO CAPITAL STOCK OF RAILROAD — LIMITED AU-

THORITY.—The Arkansas legislature authorized any county to subscribe to the stock of any railroad company in the State, provided that the amount of such subscription should not exceed $100,000. Under this act Chicot county subscribed $100,000 to the stock of the Mississippi, Ouachita & Red River Railroad Company, and $100,000 to the stock of the Little Rock, Pine Bluff & New Orleans Railroad Company, both subscriptions being made by virtue of a single election held by the voters of the county for that purpose. *Held*, that the act limited the amount of each subscription, and not the aggregate subscriptions to all railroads, and that therefore these subscriptions were not *ultra vires*. Affirmed. In error to the Circuit Court of the United States for the Eastern District of Arkansas. Opinion by Mr. Justice BRADLEY.—*Chicot County v. Lewis.*

SUPREME COURT OF KANSAS.

September, 1881.

CONSPIRACY TO BORROW MONEY UNDER FALSE REPRESENTATIONS—CIVIL LIABILITY. — Where A and B conspire together, A being irresponsible and B being the owner of real estate, that B shall make a formal application to loan brokers for a loan on said real estate, the same being of value and undoubted security therefor, and the loan being one whose accomplishment was reasonably certain; and that A, upon the strength of such application and the promise of the use of the proceeds of such loan, shall seek for and obtain a temporary loan to satisfy a pressing debt of A's, and that when the money thus sought has been obtained, then the loan applied for shall be declined: *Held*, that the party loaning upon the strength of these acts and representations, may hold both B and A responsible for the money thus loaned. Reversed. Opinion by BREWER, J.—*Lee v. Lement.*

MUNICIPAL CORPORATION — RAILWAY AID BONDS—GUARANTY.—After the Board of County Commissioners of Labette County had received a petition, and ordered an election according to the proposition set forth in the petition, to take the sense of the voters of Mount Pleasant township in said county, to subscribe $10,000 to the capital stock of a railway proposed to be constructed through said township, under the provisions of ch. 107, Laws of 1876, A & B, agents and contractors of the railway company, executed before the election their personal bond to the township, which was accepted by its officers in the sum of $10,000, conditioned that the railway company should construct its road across the northeast quarter of section 15, in said township, and locate its depot thereon; afterwards the election was held upon the proposition submitted to the electors and the vote was favorable thereto. The road was built through the township according to the terms of the proposition submitted, but not cross said section 15, nor was any depot located on said section. Thereafter the township brought its action upon the bond of A & B to recover the penalty. *Held*, that the township was not entitled to recover. Affirmed. Opinion by HORTON, C. J.—*Mount Pleasant Township v. Hobart.*

MURDER—DELIBERATE INTENT—PREMEDITATION.—1. While a premeditated, deliberate intent to take life is essential to the crime of murder in the first degree, yet if a party goes to have an interview with another, having armed himself with a deadly weapon, with the intent to compel such other to do any certain thing, or upon his refusal to kill him, such conditional intent to take life is sufficient to make the homicide, if committed, murder in the first degree. 2. It is ordinarily sufficient if the court, in its charge to the jury, state once, fully and clearly, the general propositions of law applicable to the case, such as those concerning reasonable doubt and the presumption of innocence; and it is seldom error if it fails to restate those propositions in connection with any separate and special phase of the case. 3. The court, in attempting to define reasonable doubt, said that, to exclude such doubt, the evidence must be such as to produce in the minds of prudent men such certainty that they would act on the conviction without hesitation, in their own most important affairs. *Held*, that such definition and explanation did not narrow the import of the term "reasonable doubt" to the prejudice of the substantial rights of the defendant. 4. Where parties meet and in an affray one is killed: *Held*, that an instruction was properly refused which seemed to limit the consideration of the jury to the mere circumstances of the interview, and excluded any consideration of the evident angry feelings under which the parties met. 5. Where newly-discovered testimony runs simply to the matter of threats, and only tends to make more emphatic and clear what is already plain by the testimony that the parties at the time of the meeting were enraged against each other: *Held*, that the court did not err in refusing a new trial on this ground. 6. Where a party in apparent good health is assailed, his body pierced with three bullet wounds, and he thereupon falls to the ground and dies within thirty minutes: *Held*, that a new trial was properly refused when sought on the ground that certain competent physicians had been found who would testify that none of the wounds described was necessarily fatal. Affirmed. Opinion by BREWER, J.—*State v. Kearly.*

SUPREME COURT OF MISSOURI.

May-June, 1881.

EJECTMENT — EVIDENCE — COMPETENCY OF DEFENDANT WHERE OTHER PARTIES TO CONTRACT ARE DEAD—COLOR OF TITLE—VOLUNTEER — WHAT NOT PAYMENT OF PURCHASE-MONEY. — Action of ejectment. Defendant's

answer consisted of a specific denial of the allegations of the petitions; and then among other things, set up the Statute of Limitations, and also that he had lived on the land for about twenty-five years; that about seventeen years before he conveyed it to his son E I for $4,000, taking his said son's note for the purchase-money; that E I died without having paid any part of the purchase-money, and without leaving any property to make it out of, and that possession had never been delivered to E I; and that defendant had always retained possession of the land in controversy. There was a reply denying the allegations of the petition, and also averring that in 1860, defendant, being insolvent, made the above deed to his son for the purpose of defrauding his creditors of debts which still remained due, and that the son had paid for the land by executing the $4,000 note to defendant. On the trial it appeared that the deed to E I was made in 1860, and E I died in 1861, intestate, and leaving as his only heirs the defendant and three brothers, one of whom was J P I, and one sister, J I; and that the note made by E I for the price of the land was on its face payable to J I, sister of E I and defendant's daughter; but it had never been delivered to her, and had always remained in defendant's possession. It also appeared that J P I, brother of E I, died subsequent to E I, in 1875, and that an administrator of the estate of J P I was appointed, and the land in question was sold by the administrator as that of J P I, to pay his debts, the plaintiff becoming the purchaser at said sale. *Held*, that defendant was incompetent to testify to the new matter set up in the answer, the evidence showing that to much of it E I and J P I were the original parties on the one note, and are now dead (whether such would have been the case, had defendant confined himself to a simple denial, not decided). Litton v. Shipp, 65 Mo. 305; Bradley v. West, 68 Mo. 72; Angel v. Hester, 64 Mo. 142; Ring v. Jamison, 66 Mo. 429; Locker v. Davis, 47 Mo. 142: Jones v. Quarles, 46 Mo. 423; Bank v. Schoffield, 39 Vt. 590. *Held, further*, that the court erred in not permitting plaintiff to prove in rebuttal that defendant was insolvent and made the deed to defraud creditors, it being a circumstance to show whether the possession of defendant, after the deed to E I, had been converted from a friendly into a hostile possession. Where the parties to a deed cancel it, as they suppose, by a mere verbal agreement, and the grantor remains in possession, claiming title under the rescission, he is in possession, under color of title, by relation to the boundaries mentioned in the deed so cancelled. He has resumed the possession he had prior to the making of the deed, and to the same extent, actual and constructive. While the note for the purchase-money of the land was made payable to J I, the daughter of defendant, yet the evidence tended to show that it had never been delivered to her, but had always remained in defendant's possession; she was therefore a mere volunteer, without possession, and the consideration having moved from defendant, and he having so held possession of the note, it did not operate as a payment of the purchase-money. Whether one who holds under an administrator's deed is to be regarded as a *bona fide* purchaser within the meaning of that term, or whether he takes, subject to all the equities of the party in possession, not determined in this case. Reversed and remanded. Opinion by RAY, J.—*Hughes v. Isnal.*

VENDOR'S LIEN — FRAUD — SUBROGATION. — Proceeding to enforce a vendor's lien. Plaintiff was administrator of estate of W G, and, as such, sold the land sought to be charged for payment of debts. At the sale M became the purchaser, and paid $140 in cash, and executed his note for the residue, $555. M purchased for the benefit of the defendant, and afterwards conveyed to her by a quit-claim deed. The husband of defendant, in paying off the note executed by M, fraudulently and falsely represented to plaintiff that he was the owner and holder of an allowance against G's estate, and, as such, was entitled to a portion of the proceeds of such sale, and claimed the right to pay in such portion as so much of a payment on the note; and plaintiff, placing reliance on said representations, allowed the claim, and afterwards the real owner of said allowance instituted suit against plaintiff, and compelled him to pay them the amount, $258, to which they were entitled. *Held*, that the defendant's husband was the real purchaser of the land, and that M was a mere conduit of the title to the defendant, and that the latter is to be regarded as a mere volunteer, and occupies no better position than her husband would have, had he taken the title in his own name; and also, *held, further*, that this case differs from Wooldridge v. Scott, 69 Mo. 669, in having the element of fraud in it, which the latter did not have; and inasmuch as plaintiff through the fraud of defendant's husband was compelled to pay the remainder due on the land which defendant now possesses, the plaintiff is entitled to be subrogated to whatever rights the estate of G had in the premises. Affirmed. Opinion by SHERWOOD, C. J.—*Thomas v. Bridges.*

CONTRACT—SUFFICIENCY OF MEMORANDUM—CONSIDERATION—WAIVER—DEFENSE NOT SET UP BY ANSWER.—Action on the following instrument for breach thereof. "Kansas City, Mo., Nov. 6th, 1872. Lead from Baxter to St. Louis at 22 1-2 per 100. All lead shipped by Chapman & Riggins to be forwarded by Missouri River, etc. R. Co. at above rates from January 1st, 1873, to January 1st, 1874, and above rates guaranteed for same time. [Signed.] H. J. Hayden, G. F. A. Riggins & Chapman." *Held*, 1. That an instruction to the effect that the above instrument was a valid contract was proper. While it by no means fully expresses the terms of the agreement, it is not difficult to ascertain from the language employed the substance of the stipulation. 2. Plaintiff's agreement to ship over no other road

and to give to defendant's road all their freight was a sufficient consideration for defendant's promise. 3. An instruction, to the effect that though plaintiff had in March, 1873, shipped lead by another road than defendant's, yet if defendant's officers and agents, acting in the line of their employment, had notice thereof, and defendant continued to receive plaintiff's lead till April 15, 1873, at the rates and under the terms of the contract, it was a waiver of plaintiff's breach of contract, was properly given. 4. The jury was also properly instructed that, although it might believe that it was understood at the time the instrument sued on was signed, that the same should be written out in a more formal shape and thereafter signed by the parties, yet it was believed from the evidence that, for two or three months after making said memorandum, plaintiffs delivered lead, and defendants received and shipped it under its terms and provisions, then it was a valid and binding contract, though never written out in a formal manner. Paige v. Fullerton Woolen Co., 27 Vt. 485; Miller v. McManus, 57 Ill. 126. 5. Where defendant denies the existence of a contract, and also alleges that plaintiff has violated it, he can not prove and avail himself of a rescission of it. Affirmed. Opinion by HENRY, J.—*Riggins & Chapman v. Missouri, etc. R. Co.*

QUERIES AND ANSWERS.

QUERIES.

35. The Divine law makes man stealing a felony. And Sir Wm Blackstone adds child-stealing, which becomes a common-law crime; and subsequent statutes add the term kidnapping, making it read child-stealing or kidnapping, not changing the elements of the crime of child-stealing. And the statutes of the several States in America drop the term child-stealing, but retain the term kidnapping, without altering the nature of the crime, or the acts which formerly constituted the former a crime; "does not the title child-stealing remain with all its common-law force and meaning, and is not child-stealing as applicable in any case where kidnapping will apply?" If the above will bear an affirmative answer, then stealing and larceny being the same, and Blackstone, Kent and Russell holding that larceny can not be committed of anything in which there is not a property, absolute or qualified, then is not a child, within the age when in point of law it has no will, a property? According to Hurd on Habeas Corpus, it can be contracted for and about, abandoned, emancipated, bound out, given away. The parents not having an absolute right to its custody, i may be taken away from them upon a want of fitness shown, by due course of law, it being movable and wholly subject to the will of others, and the decree of a court of competent jurisdiction. Is not the same control exercised over it, that can be over any other chattel? And if the mother and father part, and the mother takes the child, five years old, and contracts with a third person for its keeping at one dollar and fifty cents per week, the father subsequently assenting to said contract, "can the mother take and hold said child by a writ of *habeas corpus* until she shall pay for its keeping up to the time of demand ta least?"

Grand Rapids, Mich. T. H. GIRARD.

36. A leases to B for ninety-nine years, with a covenant binding himself, his heirs and assigns to renew the lease at any time within the original period. A then assigns to C; C dies and administrators are appointed. A suit is brought by one claiming the fee, and B's heirs are ousted during the original time granted by A, it appearing that A held a leasehold interest which expired subsequent to the creation of the lease to B, and prior to the assignment to C. Query: Have the heirs of B an action against C? If so, should the suit be brought against the heirs or personal representatives, a leasehold interest for ninety-nine years in Maryland being held personal property. J. E. S.

Baltimore, Md.

37. A, resident in Kentucky, sues B, resident of Ohio, in Kentucky, and obtains constructive service on B. A garnishees in C's hands a debt due B. C is a corporation organized under the laws of, and operating in Ohio. Would a personal service on an agent of C, living in Kentucky for residence only, be such a service as would compel C to retain the debt due B, subject to the order of the Kentucky Court, the fund garnisheed being in the possession of the Ohio corporation? A. G. S.

Covington, Ky.

QUERIES ANSWERED.

Query 30. [13 Cent. L. J. 219.] Where a married woman holds a statutory separate estate, with full power to sell and convey the same jointly with the husband, under a statute requiring her to acknowledge the deed upon a private examination separate and apart from her husband in the mode pointed out by the statute—can she appoint and constitute an attorney in fact to execute the deed for her? And if so, shall she execute the power of attorney jointly with her husband and upon a private examination as required in the execution of the deed? Then, will this dispense with the certificate of acknowledgment on a private examination to the deed?

Washington, D. C. G. E. H.

Ans. She can not appoint an attorney in fact. Rev. Code of Alabama, 1867, secs. 1551 and 1552, and cases cited; Code of Alabama, 1876, secs. 2707, 2708, and cases cited: Ellet v. Wode, 47 Ala. 456; Waddell v. Weaver, 42 Ala. 293, and cases cited.

St. Louis, Mo. ROBERT CRAWFORD.

Query 26. [13 Cent. L. J. 179.] L, a widower, and not the head of a family, but with children living, homesteaded a piece of land in Kansas, under the United States homestead law. After performing all the conditions requisite to entitle him to a patent, but prior to his procuring it, he married and died. The widow has no children, and is not the head of a family; she made the final proof and received the patent as widow of the deceased. Who is the owner of this land under the United States homestead law, and to whom did it descend at the death of L?

Newton, Kan. SUBSCRIBER.

Answer. In the case put concerning the rights of the widow and children in a tract of land upon which the father took the initiatory steps toward perfecting

title, and the widow under the United States statutes completed the residence and made proof, and the patent issued to her,—it does not seem to me that the cases cited by "Res" and O. J. Parker in their answers do more than construe the law on a state of facts that yet leave the case put an open question. Congress passes the title to whomsoever it sees fit, and then stops. It is elementary in practice that the State courts have a right on a proper case to decree the title of land, held under a patent, to be in another and quiet it in another; also the patentee in many cases is held to be a trustee of some one having superior rights. It seems to me that the law of descents and distributions of each State ultimately determines where this title is to vest; and were the above case mine (without knowing of a case in point), I should commence an action to have all this land declared a homestead, and one-half of it decreed to be in the children, just as though the widow had acquired homestead land with the father's money after death.

KANSAS.

Query 33. [13 Cent. L. J. 238.] In Georgia, land sold at sheriff's sale, can be reclaimed by original owner within one year, by paying the purchaser the amount paid by said purchaser for said land, with ten per cent. premium thereon, from the date of the purchase to the time of payment. Who must pay for the titles drawn? The party redeeming his land refuses to do so under the statute. The party who purchased from the sheriff says he ought not to lose the fee he paid his attorney to examine and draw the title, and that the party redeeming the land should pay. It is a question among the clients, as the attorney holds his fee. As a matter of right, who should pay for titles drawn? R. D. W., Jr.

Savannah, Ga.

Answer. It is not true, as a general proposition, that in Georgia land sold at sheriff's sale is redeemable within one year, but only so as to land sold for taxes. If a party pays an attorney a fee to examine and draft titles for land sold at sheriff's sale for taxes, he can not get it back upon the lands being redeemed within the year. First, because the law contemplates no fee for examination of record as to title, inasmuch as the rule at the sale is *caveat emptor;* and, secondly, he can not recover for the drafting of the title, because that is costs to be taken out of the funds realized by the sheriff upon the tax sale. Sec. 3696, Code of Georgia, 1873. C.

Savannah, Ga.

RECENT LEGAL LITERATURE.

MISSOURI REPORTS. Reports of Cases Argued and Determined in the Supreme Court of the State of Missouri. Thomas K. Skinker, State Reporter. Vol. 72. Kansas City, 1881: Ramsey, Millett & Hudson.

AMERICAN DECISIONS. The American Decisions, containing the cases of general value and authority decided in the Courts of the several States, from the earliest issue of the State Reports to the year 1869. Compiled and Annotated by A. C. Freeman, Counselor-at-law, and author of "Treatise on the Law of Judgments," "Co-tenancy and Partition," "Execution in Civil Cases," etc. Vols, 26, 27 and 28. San Francisco, 1871: A. L. Bancroft & Co.

UTAH REPORTS. Reports of Cases Determined in the Supreme Court of the Territory of Utah, from the January Term, 1877, to the June Term, 1880, inclu-ive. Reported by Albert Hagan, of the Salt Lake Bar. Vol. 2. Chicago, 1881: Callagham & Co.

NEVADA REPORTS. Reports of Cases Determined in the Supreme Court of the State of Nevada, during 1880. Reported by Chas. F. Bicknell, Clerk of the Supreme Court, and Hon. Thomas P. Hawley, Associate Justice. Vol. 15. San Francisco, 1881: A. L. Bancroft & Co.

NEW JERSEY EQUITY REPORTS. Beports of Cases Decided in the Court of Chancery, The Prerogative Court, and on Appeal, in the Court of Errors and Appeals, of the State of New Jersey. John H. Stewart, Reporter. Vol. 6. Trenton, New Jersey, 1881: W. S. Sharp.

A review of a volume of reported decisions, other than the first few of a new series, must of necessity be rather a tame and mechanical affair. The difficulty is, that the reviewer finds himself anticipated, because the profession, already familiar with the preceding volumes, know just what to expect from the succeeding ones, and are already in possession of that information serving as a guide to the would-be purchaser, which it is the chief office of the reviewer to furnish. A resume of the contents of the volume, though not exactly impossible, can hardly be considered interesting or profitable. The binding and general mechanical execution being usually uniform with the earlier volumes, are already sufficiently within the knowledge of the reader. Still, however, it is important that the issue of these volumes should be announced to the profession, in order that all who desire to do so, may supply themselves with copies; and therefore we announce the volumes mentioned above. Further than this there is but little, very little, for us to say. The 72d Missouri includes part of the cases decided at the April term, 1880, and some, perhaps all—it is not indicated what proportion—of those decided at the October term, 1880. When we consider that this volume makes its appearance just before the beginning of the October term, 1881, it does seem to us that it is extremely late. We have not hitherto observed the length of time which has elapsed between the date of the last decisions reported and the appearance of the volume, nor do we know who is to blame; but if the delay in this instance is a fair sample of what occurs usually, we think it would be sufficient justification to a demand for a reformation by the bar of the State. There is no reason in the nature of things, why a volume of reports should not make its appearance within three weeks after the rendition of the last decision reported.

As to the "American Decisions," we feel that to add anything to the approbation which we have hitherto expressed of this series of reports would be to make our praises fulsome. All that it is necessary for us to say is, that the volumes before us are fully up to the standard of their predecessors.